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**IN THE
COURT OF APPEALS OF INDIANA**

ST. ANTHONY MEDICAL CENTER, INC.,)

Appellant-Defendant,)

vs.)

No. 45A05-0511-CV-684

RALPH KALEMBER, Individually and as)
Administrator of the Estate of Patricia F.)
Kalember, Deceased,)

Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John R. Pera, Judge
Cause No. 45D01-0402-CT-22

August 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

St. Anthony Medical Center, Inc. appeals the trial court's order denying its motion for partial summary judgment on the claim of Ralph Kalember, individually and as administrator of the estate of his late wife Patricia, asserting that the negligence of St. Anthony's nurses proximately caused Mrs. Kalember's death.

We affirm.

ISSUE

Whether the trial court erred in denying St. Anthony's motion because Kalember had failed to establish a genuine issue of material fact as to whether there was a causal relationship between the care provided Mrs. Kalember by the nurses and her death.

FACTS

Mrs. Kalember died at St. Anthony on January 24, 1999, after her bilateral knee replacement surgery there two days earlier. On February 11, 2004, Kalember filed a complaint for medical malpractice against St. Anthony.¹ Kalember asserted that St. Anthony was vicariously liable for the alleged negligence of Dr. Vachirasomboon, anesthesiologist, and he further alleged that the St. Anthony nurses were negligent. Only the latter contention is at issue here.

On June 7, 2005, St. Anthony filed a motion for partial summary judgment on the allegation that the nurses were negligent. To support its motion, St. Anthony submitted the affidavit of Dr. Jesse Hall, and deposition testimony from Kalember's two expert witnesses: Terrance Vaisvilas, M.D., and Elisabeth Ridgely, R.N. St. Anthony cited Dr.

¹ Also originally named as defendants were orthopedic surgeon Joseph Koscielniak, anesthesiologist Ferdinand Ranos, anesthesiologist Thongchai Vachirasomboon. The three doctors were later dismissed from the suit.

Hall's opinion that no actions or omissions on the part of the nurses proximately caused Mrs. Kalember's death. St. Anthony also cited testimony by Dr. Vaisvilas that he had no opinion as to the conduct of the nurses, and testimony by Nurse Ridgely that she had no opinion with respect to causation of death. Therefore, St. Anthony asserted, because there was no expert testimony stating that negligence by the nurses proximately caused Mrs. Kalember's death, it was entitled to summary judgment on the claim as to the nurses.

Kalember filed a memorandum in opposition. He designated to the trial court deposition testimony from Nurse Ridgely stating that St. Anthony nurses had breached the applicable standard of care, and testimony from Dr. Vaisvilas as to the causation of Mrs. Kalember's death. The trial court denied St. Anthony's motion for partial summary judgment, finding there were

genuine issues of material fact as to whether the nurses employed by [St. Anthony] were negligent in their care and treatment of [Mrs. Kalember] and, if so, whether that negligence was a proximate cause of the death of [Mrs. Kalember].

(App. 20). In response to St. Anthony's motion, the trial court certified its order for interlocutory appeal, and we accepted jurisdiction. See Ind. Appellate Rule 14(B).

DECISION

As the party "appealing from a summary judgment decision," St. Anthony has the burden of persuading us that the "denial of summary judgment was erroneous." Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 908 (Ind. 2001). When we review the appeal of a decision to deny a motion for summary judgment, our standard of review

is the same as that used in the trial court: summary judgment is appropriate only where the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.

Corr v. American Family Ins., 767 N.E.2d 535, 537 (Ind. 2002). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning, 754 N.E.2d at 909. All facts and reasonable inferences from those facts are construed in favor of the nonmoving party. Id. If there is any doubt as to what conclusion a jury could reach, summary judgment is improper. Id.

The movant for summary judgment has the initial burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Shambaugh & Son, Inc. v. Carlisle, 763 N.E.2d 459, 461 (Ind. 2002) (citing Ind. Trial Rule 56(C)). Once the movant designates sufficient evidence to eliminate any genuine factual issues, the burden shifts to the nonmovant to come forth with contrary evidence. Id.

In a medical malpractice action based upon negligence, the plaintiff must establish (1) a duty on the part of the defendant in relation to the plaintiff; (2) failure on the part of the defendant to conform its conduct to the requisite standard of care required by the relationship; and (3) an injury to the plaintiff resulting from that failure. Oelling v. Rao, 593 N.E.2d 189, 190 (Ind. 1992). Further, to establish a *prima facie* case of medical malpractice, the plaintiff must adduce “expert testimony” to show that the defendant’s performance (1) “fell below the applicable standard of care,” and (2) that this negligence “was the proximate cause of the plaintiff’s injuries.” Dughaish ex rel. Dughaish v. Cobb,

729 N.E.2d 159, 164 (Ind. Ct. App. 2000), trans. denied. When the defendant moves for summary judgment and can show that there is no genuine issue as to *any one* of the aforementioned elements, the defendant is entitled to summary judgment as a matter of law. Chambers by Hamm v. Ludlow, 598 N.E.2d 1111, 1116 (Ind. Ct. App. 1992).

St. Anthony's motion sought summary judgment on Kalember's claim of the nurses' negligence. It cited Dr. Hall's affidavit, wherein he cited his professional credentials and area of practice, stated his familiarity with the standard of care for St. Anthony nurses caring for Mrs. Kalember and that he had reviewed her medical records, and opined that "no actions taken or not taken by the nursing staff of St. Anthony . . . proximately caused or proximately contributed to cause Patricia Kalember's death." (Tr. 63). St. Anthony asserts that this affidavit "establish[ed] the lack of causation and shift[ed] the burden to [Kalember] to produce expert testimony to rebut Dr. Hall's opinion." St. Anthony's Br. at 9. According to St. Anthony, Kalember failed to carry this burden. Specifically, St. Anthony argues that Kalember's "cited deposition testimony from Nurse Ridgely and Dr. Vaisvilas" failed to provide the necessary "expert testimony that any alleged negligence on the part of the St. Anthony nurses proximately caused Patricia Kemer's death" because (1) Nurse Ridgely expressly stated that she would not be offering an opinion on causation, and (2) Dr. Vaisvilas expressly stated that he had no opinion as to whether the nurses had breached the standard of care. Id. at 9. We cannot agree.

St. Anthony begins by reminding us that both Nurse Ridgely and Dr. Vaisvilas "testified that they would not offer any opinions that the conduct of the nurses

proximately caused Patricia Kalember's death." St. Anthony's Br. at 8. However, St. Anthony cites no authority for the proposition that such statements are dispositive and may not be otherwise contravened by evidence meeting the standards of Trial Rule 56.

Nurse Ridgely did state that she would not testify as to causation. Further, we have held "that nurses are not qualified to offer expert testimony as to the medical cause of injuries." Long v. Methodist Hospital of Indiana, Inc., 699 N.E.2d 1164, 1169 (Ind. Ct. App. 1998), trans. denied. However, as St. Anthony concedes, "Nurse Ridgely did provide testimony that the nurses breached the standard of care." Reply at 2. Indeed, introduced with her deposition testimony was Nurse Ridgely's report, which concluded that based upon her experience as a registered nurse and her review of Patricia Kalember's medical records and of St. Anthony policy, that the nurses had deviated from the standard of care. Specifically, she found their failures as follows: "to monitor and document vital signs of a patient receiving epidural analgesia according to hospital"; "to adequately assess and document Ms. Kalember's response to narcotic analgesia"; "to provide adequate and appropriate narcotic analgesia documentation"; "to notify the anesthesia department of a change Ms. Kalember's level of sedation"; and "to discontinue narcotic analgesia according to policy when Ms. Kalember became difficult to arouse." (App. 127-28).

Twice in his deposition Dr. Vaisvilas expressly stated that he would not be offering an opinion as to the causation of Mrs. Kalember's death, and the inference from those two pages of testimony is that he intended to offer an opinion as to the anesthesiologist. However, the deposition testimony cited by Kalember includes Dr.

Vaisvilas's statement that Mrs. Kalember's death was *caused by* "two things, . . . both related to the narcotic": "either respiratory depression, insufficient ventilatory drive to sustain life, and/or excessive sedation that caused her airway to be unprotected and, therefore, she obstructed." (App. 132).

Dr. Vaisvilas explained that the narcotic could "cause respiratory depression" by slowing the patient's breathing, and that deepening sedation could result in the "tongue . . . fall[ing] back into the oral pharynx." Id. Dr. Vaisvilas then cited to notes in Mrs. Kalember's medical records showing that "when the nurse came in at 0315 on the 24th, she certainly had inadequate ventilation at that point"²; but that "as early as 1400 on the 23rd," there were "signs of arousing slowly," which "is a big red flag." (App. 134, 135).

Further, Dr. Vaisvilas's deposition testimony also discussed the "failure to monitor," meaning "a failure to get a warning signal when disaster was impending," and explained that the "failure to closely observe" by "your best monitor, your nurses' close observation . . . led to a failure of any system of warnings when someone was about to arrest or obstruct." (App. 136). When asked what "warning signals" he believed had been missed, Dr. Vaisvilas answer was "the level of her sedation by someone who is the eyes and ears for the doctor in the hospital at that time." Id. When asked "what condition" he believed "would have been identified with greater monitoring," he answered: "[h]ypoventilation or airway obstruction," the patient's slowing heart rate and

² According to the medical records submitted as designated evidence by Kalember, "shortly after 3 AM on 1/24, [Mrs. Kalember] was found unresponsive by nursing staff. Code blue was called and CPR initiated." (App. 88). Her heart beat and blood pressure were subsequently restored, but testing established her "[b]rain death," and she was "pronounced deceased at 2:35 P.M. on January 24, 1999." (App. 89).

breathing, and dropping saturation levels. Id. Dr. Vaisvilas testified that “missing the evidence of hypoventilation or airway obstruction led to . . . respiratory and cardiac arrest,” from which she “never recovered” and died. (App. 137).

It may be true that, as St. Anthony argues, Dr. Vaisvilas’s statements were intended to be directed solely to “the allegations against the anesthesiologist defendants.” St. Anthony’s Br. at 12. However, such *intent* is not clearly established by the designated evidence. Certainly the designated deposition testimony falls far short of “mak[ing] clear that [Dr. Vaisvilas’s] opinions related to the anesthesiologists only.” Reply at 8.

When the facts and reasonable inferences from the deposition testimony of Dr. Vaisvilas as to the causation of Mrs. Kalember’s death are construed in favor of Kalember, there is “doubt as to what conclusion a jury would reach” as to whether the nurses’ deviations from the standard of care, as identified by Nurse Ridgely, were the proximate cause of Mrs. Kalember’s death. Owens Corning, 754 N.E.2d at 909. Because there was a genuine issue of material fact as to whether the negligence of the nurses was the proximate cause of Mrs. Kalember’s death and Kalember’s injuries, the trial court did not err in denying St. Anthony’s motion for partial summary judgment on Kalember’s claim against the nurses.

Affirmed.

RILEY, J., and VAIDIK, J., concur.